INDEX

	Page
Opinion below	1
Jurisdiction	1
Statute involved	2
Question presented	2
Statement	2
The question is substantial	5
Conclusion	12
Appendix A	13
Appendix B	15

CITATIONS

Cases:

Alabama State Federation of Labor v. *McAdory*, 325 U.S. 450	6
Ben Hur Coal Co. v. *Wells*, 242 F. 2d 481	8
Boyce Motor Lines v. *United States*, 342 U.S. 337	7
Cline v. *Frink Dairy Co.*, 274 U.S. 445	10
F. & A. Ice Cream Co. v. *Arden Farms Co.*, 98 F. Supp. 780	11
Federal Trade Commission v. *Anheuser-Busch, Inc.*, 363 U.S. 536	9
Jordan v. *DeGeorge*, 341 U.S. 223	6
Liverpool, N.Y. & P.S. Co. v. *Emigration Comm'rs*, 113 U.S. 33	6
Marbury v. *Madison*, 1 Cranch 137	6
Moore v. *Mead's Fine Bread Co.*, 348 U.S. 115	9
Muller, E. B. v. *Federal Trade Commission*, 142 F. 2d 511	9
Nash v. *United States*, 229 U.S. 373	7, 9, 10
Nashville Milk Co. v. *Carnation Co.*, 355 U.S. 373	11
Porto Rican American Tobacco Co. v. *American Tobacco Co.*, 30 F. 2d 234	9
Roth v. *United States*, 354 U.S. 476	11
Screws v. *United States*, 325 U.S. 91	7, 10, 11
United Public Workers v. *Mitchell*, 330 U.S. 75	6
United States v. *Cohen Grocery Co.*, 255 U.S. 81	10
United States v. *Harriss*, 347 U.S. 612	2, 6, 11
United States v. *Petrillo*, 332 U.S. 1	10, 11
United States v. *Ragen*, 314 U.S. 513	8, 10
United States v. *Raines*, 362 U.S. 17	6, 11

Constitution and statutes:

	Page
United States Constitution:	
Fifth Amendment	6
Sixth Amendment	6
Lever Anti-Profiteering Act, 41 Stat. 297	10
Robinson-Patman Act, Section 3, 49 Stat. 1526, 15 U.S.C. 13a	1, 2, 3, 4, 5, 6, 8, 9, 11, 15
Sherman Act, Section 1, 15 U.S.C. 1	3, 4

Miscellaneous:

80 Cong. Rec. 6332	9
Price Discrimination, Hearings before Subcommittee of Senate Judiciary Committee on S. 4171, 74th Cong., 2d Sess.	9

In the Supreme Court of the United States

OCTOBER TERM, 1961

No.

UNITED STATES OF AMERICA, APPELLANT

v.

NATIONAL DAIRY PRODUCTS CORP., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

JURISDICTIONAL STATEMENT

OPINION BELOW

The district court rendered no opinion. Its order dismissing the counts of the indictment charging violation of Section 3 of the Robinson-Patman Act is set forth in Appendix A, *infra*, pp. 13-14.

JURISDICTION

The counts of the indictment involved in this appeal were filed under Section 3 of the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13a. The order of the district court, dismissing these counts as based on an unconstitutional statute, was entered on March 20,

competition or eliminating a competitor." App. B, *infra*, p. 15. The district court held that this provision is so "vague, indefinite, and uncertain" as to violate the Fifth and Sixth Amendments. We submit, however, that at least as applied to the acts charged in this indictment—selling below cost for the purpose of destroying competition—the Act is constitutional.

It is, of course, settled doctrine that the Court decides only the specific constitutional question presented by the particular record, since "[t]he delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases [that may be] imagined." *United States* v. *Raines*, 362 U.S. 17, 22. See also, *e.g.*, *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 461; *United Public Workers* v. *Mitchell*, 330 U.S. 75, 89-90; *Liverpool, N. Y. & P. S. Co.* v. *Emigration Comm'rs*, 113 U.S. 33, 39; *Marbury* v. *Madison*, 1 Cranch 137, 179-80. The essential question, therefore, is whether the proscriptions of the statute are too vague and indefinite to give a person of ordinary intelligence fair notice that the acts charged by *this* indictment are forbidden by law. See *United States* v. *Harriss*, 347 U.S. 612, 617; *Jordan* v. *DeGeorge*, 341 U.S. 223, 230-32.

The offenses with which appellants were charged under Section 3 involved two elements: (a) sales below cost and (b) the purpose of destroying competition or eliminating a competitor. No businessman could rationally doubt that such sales, made with this intent, violated the statute.

(a) The requirement that the prosecution prove the "purpose of destroying competition, or eliminating a

competitor" is sufficient to relieve the statute of any objection that it punishes without warning conduct which the accused might reasonably suppose to be lawful. The quoted words are sufficiently definite. *Nash v. United States*, 229 U.S. 373. One who sets a low price for that purpose challenges the traditional anti-trust policy. He cannot complain if he is prosecuted therefor, since, at best, he "deliberately goes perilously close to an area of proscribed conduct * * * [and] take[s] the risk that he may cross the line" (*Boyce Motor Lines v. United States*, 342 U.S. 337, 340). This should be enough to meet the charge of unconstitutional vagueness where there is no lack of standards by which the judge or jury may measure the application of the statute to the defendant's conduct. As pointed out in Mr. Justice Douglas' opinion in *Screws v. United States*, 325 U.S. 91, 101-102, in which three other members of the Court joined:

> The Court, indeed, has recognized that the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid. The constitutional vice in such a statute is the essential injustice to the accused of placing him on trial for an offense, the nature of which the statute does not define and hence of which it gives no warning. See *United States v. Cohen Grocery Co., supra.* But where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from

lack of warning or knowledge that the act which he does is a violation of law. The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware."

There are, of course, situations in which sales below cost may have a legitimate commercial objective. They may be made to dispose of excess inventory or obsolete or spoiling merchandise, or for the purpose of meeting an equally low price of a competitor. But there can be no doubt as to the legality of such conduct, since the Act covers only sales made for the purpose of destroying competition or eliminating a competitor. Section 3 cannot "become a trap for those who act in good faith" (*United States* v. *Ragen*, 314 U.S. 513, 524), so long as the only sales at unreasonably low prices that it condemns are those made for predatory purposes. See *Ben Hur Coal Co.* v. *Wells*, 242 F. 2d 481, 486 (C.A. 10).

(b) In the present case we need not rely solely upon the requirement and allegation of a purpose to destroy competition or injure a competitor. The statutory phrase defining the other element of the crime, sales at "unreasonably low prices," when read in the context of the national policy of preserving conditions conducive to competition, plainly covers the appellees' conduct, *i.e.*, sales below cost made with predatory intent. And the reference to antitrust policy is explicitly supplied by the requirement of a "purpose of destroy-

ing competition, or eliminating a competitor.". This is sufficiently definite to support a criminal prosecution. *Nash v. United States, supra.* The legislative background removes any conceivable ground for uncertainty. Although its deliberations upon Section 3 were primarily concerned with price discriminations, Congress was informed that destruction of competition or elimination of a competitor could also result from "unreasonable price cutting offensive to the competitive principle". *Price Discrimination*, Hearings before Subcommittee of Senate Judiciary Committee on S. 4171, 74th Cong., 2d Sess., p. 64; see also *id.* at pp. 85-86. The ban in the third clause of Section 3 on selling at unreasonably low prices was particularly directed against selling below cost, when done with the objective of driving competitors out of business or otherwise injuring competition. *Id.* at pp. 14, 18, 53-54; 80 Cong. Rec. 6332. This Court has recognized that below-cost sales made for a predatory purpose typify the unreasonably low prices at which this part of the Robinson-Patman Act was directed. *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115, 119-20; Cf. *Federal Trade Commission v. Anheuser-Busch, Inc.*, 363 U.S. 536, 552; *E. B. Muller v. Federal Trade Commission*, 142 F. 2d 511 (C.A. 6); *Porto-Rican American Tobacco Co. v. American Tobacco Co.*, 30 F. 2d 234, 237 (C.A. 2). Consequently, no reasonably intelligent person in the appellees' situation could have failed to know that the sales below cost charged in the indictment fell within the ambit of the phrase "unreasonably low prices," whatever might be its uncertainty in other applications.

In the court below, appellees relied on various cases in which criminal statutes containing a standard of "reasonableness" were held unconstitutional for vagueness. The leading case, which appellees urged is controlling here, is *United States* v. *Cohen Grocery Co.*, 255 U.S. 81. There, the Court invalidated the provision of the Lever Anti-Profiteering Act (41 Stat. 297) that prohibited any "unjust or unreasonable rate or charge" for necessaries. The Court ruled (p. 89) that this provision did not provide "an ascertainable standard of guilt" because it left open "the widest conceivable inquiry" and in substance "merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." The vice of that statute (and of comparable statutes invalidated in the other cases upon which appellees relied, such as *Cline* v. *Frink Dairy Co.*, 274 U.S. 445) was not its use of the "reasonableness" standard as such, but its failure to relate this standard to any more precise rules of conduct discernible from either the legislative or historical background of the legislation. See *Nash* v. *United States*, 229 U.S. 373, 377; *Cline* case, *supra*, at 460-465; *Screws* v. *United States*, *supra*, at 95-96, 101-102; *United States* v. *Petrillo*, 332 U.S. 1, 7-8; *United States* v. *Ragen*, 314 U.S. 513.

In the present case, however, the standard of "unreasonably low prices" does provide "an ascertainable standard of guilt" (*Cohen*, *supra*), first, because it covers such sales only when made to destroy competition or eliminate a competitor, and, second, because, whatever may be its exact contines, it plainly prohibits predatory pricing at less than cost. In these circum-

stances, Section 3 is no more vague or ambiguous than many other federal statutes whose constitutionality has been sustained. See *United States* v. *Harriss*, 347 U.S. 612, 624, n. 15.

The possibility that the "unreasonably low prices" provision of Section 3 would give rise to serious constitutional difficulties in other situations[2] is no basis for invalidating the statute as applied to an indictment charging sales below cost designed to eliminate competition. See *United States* v. *Petrillo*, 332 U.S. 1, 7-8; *Roth* v. *United States*, 354 U.S. 476, 491-492; *United States* v. *Raines*, 362 U.S. 17, 20-26. Whatever may be the outer limits of the third clause of Section 3, we submit that when the appellees intentionally sold below cost for the purpose of destroying competition, they were under "fair warning" (*Screws* v. *United States*, *supra*, at 104) that they were thereby violating the statutory prohibition against making sales for that purpose "at unreasonably low prices."

2. The constitutionality of this provision of the Robinson-Patman Act plainly presents an important question calling for resolution by this Court. While there have been few criminal prosecutions under this provision, the paucity is not a true measure of its importance. Its mere existence has been a significant deterrent throughout the 25 years since the statute was enacted.

---

[2] *See Nashville Milk Co.* v. *Carnation Co.*, 355 U.S. 373, 378, n. 7. We are not, of course, conceding that to be constitutional the statute must be construed as limited to sales below cost. It may also be properly applicable to sales at prices above cost that are nevertheless, in common understanding, uncommonly low in relation to the seller's customary price levels. *See F. & A. Ice Cream Co.* v. *Arden Farms Co.*, 98 F. Supp. 180, 189-190 (S.D. Calif.).

CONCLUSION

The question presented by this appeal is substantial and important. Probable jurisdiction should be noted.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

LEE LOEVINGER,
Assistant Attorney General.

RICHARD A. SOLOMON,
RICHARD H. STERN,
Attorneys.

JUNE, 1961.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION.

CRIMINAL ACTION NO. 20542

UNITED STATES OF AMERICA,

v.

NATIONAL DAIRY PRODUCTS CORPORATION and RAYMOND J. WISE, DEFENDANTS

ORDER DISMISSING ROBINSON-PATMAN COUNTS OF INDICTMENT

Be it remembered, this 6th day of March, 1961, the above-entitled matter coming on for hearing before the Honorable R. Jasper Smith, one of the Judges of said court upon the motion of the defendant National Dairy Products Corporation to dismiss Counts Two, Four, Six, Eight, Ten, Thirteen, and Fifteen of the indictment and upon the motion of the defendant Raymond J. Wise to dismiss Count Thirteen of the indictment for the reason that Section 3 of the Robinson-Patman Act is so vague and indefinite in its terms as to violate the Constitution of the United States and the defendants appearing by John T. Chadwell and John H. Lashly, Esquire, and the United States of America appearing by Earl A. Jinkinson, James E. Mann, and Robert L. Eisen, and the Court, having heard oral arguments on said motion and having read the briefs submitted by the respective parties and being otherwise fully advised in the premises, finds:

That the part of Section 3 of the Robinson-Patman Act (15 U.S.C. § 13a) quoted herein, to wit:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce * * *

> to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

is so vague, indefinite, and uncertain so as to violate the Fifth and Sixth Amendments to the Constitution of the United States and said counts of the indictment should be dismissed.

IT IS THEREFORE ORDERED:

That Counts Two, Four, Six, Eight, Ten, Thirteen, and Fifteen of the above-entitled indictment be, and they hereby are, dismissed.

ENTER:

s R. JASPER SMITH,
United States District Judge.

Dated: MARCH 20, 1961.

APPENDIX B

Section 3 of the Robinson-Patman Act, 49 Stat. 1528, 15 U.S.C. 13a, reads as follows:

Discrimination in rebates, discounts, or advertising service charges; underselling in particular localities; penalties.

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both.